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10                   **UNITED STATES DISTRICT COURT**  
11                   **DISTRICT OF NEVADA**

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13 DONNA ABILA,  
14                   Plaintiff,  
15 v.  
16 UNITED STATES OF AMERICA,  
17                   Defendant.

Case No. 2:09-CV-01345-KJD-VCF

**ORDER**

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19                   Before the Court is the Government's Motion to Dismiss (#65) . Plaintiff has filed an  
20 opposition and countermotion for sanctions (##66, 68). The Government has filed a reply (#71) and  
21 Plaintiff has filed a response to the reply (#73).

22                   Background

23                   On June 2, 2005, Plaintiff was treated by a physician at the Mike O'Callaghan Federal  
24 Hospital on Nellis Air Force Base. Plaintiff alleges serious injuries arising from the treatment she  
25 received. On May 9, 2006, Plaintiff submitted to the Government form SF-95, initiating an  
26 administrative claim as required by the Federal Tort Claims Act 28 U.S.C. § 2674 (the "FTCA").

1 Over the next two and one-half years, Plaintiff and the Government worked to resolve the matter.  
2 Eventually the parties reached an impasse. On February 12, 2009, almost four years after the injury  
3 and almost three years after Plaintiff filed her administrative claim, the Government finally denied  
4 Plaintiff's claim in writing. The denial letter stated that if Plaintiff was unsatisfied with the  
5 Government's response, she could "file suit in an appropriate United States District Court not later  
6 than six months after the date of mailing this letter." (#33 Exh. 2). Plaintiff filed her Complaint on  
7 July 24, 2009.

8 On February 17, 2011, the Government moved to dismiss the case for lack of subject matter  
9 jurisdiction, arguing that the action was barred because it was filed beyond the three-year limitations  
10 period in N.R.S. 41A.097(2). On August 8, 2011, the Court issued an Order (#49) denying the  
11 motion to dismiss and concluding that the FTCA preempted Nevada's limitations period. The  
12 Government now argues that the law on which the Court relied in its prior order has changed and that  
13 this action should be dismissed.

14 I. Discussion

15 A. Legal Standard

16 The Government's motion is presented as a motion to dismiss for lack of subject matter  
17 jurisdiction. However, because it asserts the same grounds for dismissal as the prior motion, it is  
18 construed as a motion for reconsideration. A motion to reconsider must provide the court with valid  
19 grounds for reconsideration by: (1) showing some valid reason why the court should reconsider its  
20 prior decision, and (2) setting forth facts or law of a strongly convincing nature to persuade the court  
21 to reverse its prior decision. Frasure v. United States, 256 F. Supp. 2d 1180, 1183 (D. Nev. 2003).  
22 "Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence,  
23 (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening  
24 change in controlling law." School Dist. No. IJ, Multnomah County v. ACandS, Inc., 5 F.3d 1255,  
25 1263 (9th Cir.1993).

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1           B. N.R.S. 41A.097(2)

2           Nevada law includes the following provision addressing when actions must be  
 3 initiated against health care providers:

4           [A]n action for injury or death against a provider of health care may not be  
 5 commenced more than 3 years after the date of injury or 1 year after the plaintiff  
 6 discovers or through the use of reasonable diligence should have discovered the  
 7 injury, whichever occurs first...

8           N.R.S. 41A.097(2).<sup>1</sup>

9           C. Previous Order

10          The Court determined in its prior Order that “the Ninth Circuit has unambiguously held that  
 11 the FTCA’s statute of limitations, 28 U.S.C. § 2401 preempts any ‘state period of limitation.’” (Dkt  
 12 #49) (citing Poindexter v. U.S., 647 F.2d 34, 36 (9th Cir. 1981)). The Order stated that:

13          “a court must look to state law for the purpose of defining the actionable wrong for  
 14 which the United States shall be liable, but to federal law for *the limitations of time  
 15 within which the action must be brought.*” Poindexter v. U.S., 647 F.2d at 36.  
 16 (emphasis added). While a statute of repose may be different than a statute of  
 17 limitations, it certainly is a “limitation of time within which an action must be  
 18 brought.”

19          (Dkt #49.) The Court ultimately held that the FTCA claim was timely. In coming to this conclusion,  
 20 the Court noted that:

21          Nevada courts have not specifically held that N.R.S. 41A.097(2) is a statute of repose  
 22 or that it creates a substantive right. But even if it had, the Supreme Court has noted  
 23 that state court determinations of those distinctions are “immaterial” to federal courts  
 24 and stated “[p]lainly enough, a statute that would completely bar recovery in a suit if

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25          <sup>1</sup> At a June 15, 2010 deposition of the treating physician, the parties became aware of the existence of a  
 26 multi-page post-operative report created by the physician immediately after the procedure at issue. This report had not  
 27 been produced in previous discovery. Plaintiff contends that, if this statute applies, it is tolled pursuant to N.R.S.  
 28 41A.097(3) which provides:

29          This time limitation is tolled for any period during which the provider of health care has concealed  
 30 any act, error or omission upon which the action is based and which is known or through the use of  
 31 reasonable diligence should have been known to the provider of health care.

32          Because the Court affirms its previous determination that Nevada’s limitations period does not bar the claim, it need not  
 33 decide whether omission of the report tolled the limitations period.

1       brought in a [s]tate court bears on a [s]tate created right vitally and not merely  
 2       formally or negligibly.” Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99 (1945)  
 3       (holding that a state statute of limitations is substantive state law in diversity actions  
 4       under the Eire doctrine). Even though a statute of limitations is substantive law under  
Eire principles, the Court in Poindexter held that Congress’s intent was to allow  
 5       FTCA suits otherwise barred by Arizona’s statute of limitations. The Government’s  
 6       argument that the three-year limitation in N.R.S. 41A.097(2) bars this claim because  
 7       it is substantive law is therefore unavailing.

8       (Id.)

9       In the Order, the Court noted two district court cases that dealt with similar questions: Zander  
 10      v. United States, 2011 WL 345884 (D.Md. 2011), and Jones v. U.S. 2011 WL 1565734 \*9  
 11      (M.D.Tenn. 2011). In those cases, the plaintiffs timely filed administrative claims which were  
 12      ultimately denied after the state limitations periods had expired. The district courts in those cases  
 13      held that the FTCA preempted the state limitations periods. The Court examined these cases in its  
 14      prior order because they “comport with the holding in Poindexter.”

15       The Government now argues that the Fourth and Sixth Circuits have issued contrary opinions  
 16      “thereby overruling the cases on which this Court relied.” As previously indicated, the Court relied  
 17      upon Ninth Circuit law in reaching its decision, not Zander and Jones. Further, the cases cited by the  
 18      Government do not form a basis to set aside the prior Order.

#### 19       D. Huddleston

20       The Tennessee Supreme Court has held that the three-year limitations period for medical  
 21      malpractice claims is a statute of repose. Mills v. Wong, 155 S.W.3d 916, 920 (Tenn. 2005). In  
 22      Huddleston v. United States, 2012 WL 1816261 (6th Cir. 2012), the court stated that in the case  
 23      before it, “applying Tennessee’s statute of repose to FTCA plaintiffs does not run afoul of the  
 24      Supremacy Clause.” However, the Sixth Circuit expressly stated:

25       We need not decide whether Huddleston could bring suit if he had filed his  
 26      administrative claim with the VA within three years because Huddleston did not, in  
 27      fact, file his claim with the VA until December 2009, two months after the statute of  
 28      repose extinguished his claim.

29       Id.

1       The Government argues that Huddleston “effectively overrules Jones” because Jones states  
 2 that a plaintiff’s FTCA claim is extinguished “only if the claimant fails to meet the deadlines in [the  
 3 FTCA’s] § 2401(b), and a state’s statute of repose has no effect on the federal claim.” Jones, 2011  
 4 WL 1565734, at \*9. The Government glosses over the very distinction between the cases that the  
 5 Sixth Circuit itself made: in Jones, the FTCA administrative claim was timely filed; in Huddleston it  
 6 was not.

7       Here, Plaintiff timely filed her administrative claim. The Court will not use Huddleston to  
 8 bar Plaintiff’s claim when the Sixth Circuit specifically declined to extend its opinion to these facts.  
 9 Additionally, unlike the Tennessee statute at issue in both Huddleston and Jones, N.R.S. 41A.097(2)  
 10 has not been held to be a statute of repose. Accordingly, Huddleston provides no basis for  
 11 reconsideration of the Court’s prior order.

12       E. Anderson

13       In Anderson v. U.S., the plaintiff timely filed her administrative claim, but after nearly four  
 14 years in the administrative process, it was finally denied. 669 F.3d 161, (4 Cir. 2011). Plaintiff filed  
 15 suit and the district court held that the claim was barred because Maryland’s five-year limitations  
 16 period was a statute of repose. The Fourth Circuit Court of Appeals certified to the Maryland Court  
 17 of Appeals the question of whether a statute that provides a time frame for filing actions against  
 18 health care providers is one of repose or limitations. The Fourth Circuit stated that

19       the key inquiry in this case is whether Section 5-109(a)(1) is a substantive statute of  
 20 repose or a procedural statute of limitations. If the former, then Anderson’s claim  
 21 may be barred, because allowing it to proceed would potentially impose liability on  
 22 the government in a different manner and to a greater extent than on a private  
 individual under like circumstances. If the latter, however, the FTCA’s two-year  
 statute of limitations preempts the state statute and Anderson’s claim survives  
 because it was properly presented within that period.

23 Id. at 164-65. (citations omitted).

24       The Government is correct that Fourth Circuit suggests that it would reject Zander’s holding  
 25 that the FTCA preempts a statute of repose. However, the Maryland Supreme Court ultimately  
 26 determined that the five-year limitations period is not a statute of repose, which ensured the survival

1 of the claim. See Anderson v. United States, 2012 WL 2361489 (Maryland, 2012). The  
 2 Government asks the Court to predict that Nevada's Supreme Court would come to the opposite  
 3 conclusion, and then apply the hypothetical ruling contemplated by the Fourth Circuit.

4 This speculative argument does not warrant setting aside the Court's previous Order. The  
 5 Court's prior Order relied upon Ninth Circuit precedent holding that courts should look to federal  
 6 law in determining "the limitations of time within which the action must be brought." Poindexter v.  
 7 U.S., 647 F.2d at 36. Anderson does not compel a different result.

8 F. Mamea

9 Mamea v. United States, a recent case from the District of Hawaii, illustrates the application  
 10 of current Ninth Circuit law in this area.<sup>2</sup> In that case, the court noted that Hawaii law does not  
 11 specify whether the six-year limitations period for medical malpractice claims is a statute of repose.  
 12 However, the Mamea court determined that the distinction was not relevant because state limitations  
 13 periods are preempted by the FTCA's limitations period in 28 U.S.C. § 2401(b). Mamea v. United  
 14 States. 2011 WL 4371712, (D.Hawaii, 2011). The Mamea court examined Poindexter and  
 15 concluded that "[t]he potential conflict between the time requirement for the filing of a civil action  
 16 pursuant to [Hawaii's limitation period] and the time requirement for the filing of an administrative  
 17 claim pursuant to § 2401(b) indicates that Congress intended § 2401(b) to occupy the field of both  
 18 statutes of limitations and statutes of repose." Id. at \*10.<sup>3</sup>

19 Mamea's consistent holding further demonstrates that reconsideration of the Court's prior  
 20 order is unwarranted.

21 III. Countermotion for Sanctions

22 Plaintiff seeks sanctions in the amount of \$10,000. According to Plaintiff, the Government  
 23 "misrepresented and mischaracterized" Anderson and Huddleston and refused to withdraw its

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25           <sup>2</sup> The United States has appealed the ruling in Maema. 9th Cir. Docket #: 11-17714.

26           <sup>3</sup> The Mamea court cited to this Court's prior Order and noted that the cases were factually distinguishable since,  
 the plaintiff in Mamea did not file the administrative claim within the six-year limitations period.

1 motion after Plaintiff provided it with Mamea and the Maryland Supreme Court's decision on the  
2 question certified in Anderson. Nothing suggests an improper motive on the part of the Government  
3 and sanctions are unwarranted. Accordingly, the countermotion is denied.

4 IV. Conclusion

5 Plaintiff timely filed her administrative claim. After nearly three years, when the claim was  
6 ultimately denied, the Government informed Plaintiff that she could file an FTCA case in district  
7 court within six months. Plaintiff filed this case within six months.

8 The Fourth and Sixth Circuit cases cited by the Government are distinguishable and Nevada  
9 and Ninth Circuit law do not compel the Court to dismiss this action under these facts. Accordingly,  
10 **IT IS HEREBY ORDERED** that the Government's Motion to Dismiss (#65) is **DENIED**.

11 **IT IS FURTHER ORDERED** that Plaintiff's Countermotion for Sanctions (#68) is  
12 **DENIED**.

13 DATED this 3rd day of October 2012.



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17 Kent J. Dawson  
18 United States District Judge  
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